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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 612

SCOTTIE ALTON ALSUP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 7-11) has not yet been reported. The opinion of the district court (not reported) is printed at Pet. 5-6 and R. 8-9.

JURISDICTION

The judgment of the court of appeals was entered January 28, 1955. The petition for a writ of certiorari was filed February 23, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

The indictment, laid under 18 U. S. C. 874, alleges that petitioner, a union representative whose approval had to be obtained before a person could be employed on a certain federally-financed project, willfully and fraudulently, by intimidation of procuring dismissal of employment, caused employees to give up to him part of their wages. The court of appeals has ruled that, since it does not appear from the face of the indictment that petitioner was engaged in legitimate union activities, the indictment states an offense under the statute. The question presented is whether this is a proper construction of the indictment.

STATUTE INVOLVED

18 U. S. C. 874 provides:

> Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

An indictment in four counts laid under 18 U. S. C. 874 was returned against petitioner in the

United States District Court for the Southern District of Mississippi. Each count charged that a company engaged in construction of public works financed by United States funds had entered into an agreement with petitioner, a union representative, that it would employ only members of the union or other persons approved by the union or petitioner, and that petitioner had willfully and fraudulently, "by means of intimidation of procuring dismissal from employment," caused a named employee of the company to pay over to him part of the compensation earned on the project (R. 2-6). On petitioner's motion, the district court dismissed the indictment (R. 9-10) holding, on the authority of *United States* v. *Carbone,* 327 U. S. 633, that 18 U. S. C. 874 does not apply to legitimate union activity (R. 8-9).

The United States appealed, contending that the district court had misconstrued the indictment as alleging legitimate union activity, whereas it alleged merely that petitioner had used his power as a union representative to obtain funds from the employees; and that, if properly construed, the indictment stated an offense under the statute. The court of appeals reversed, holding that the indictment set forth an offense under the statute (Pet. 7-11. It stated (Pet. 10-11):

> For aught that appears in the indictment, appellee may very well have been using his union position and the agreement with the employer to extort money from employees for

his own private gain in no way connected with the union or its "legitimate activities".

* * * * *

Facts may appear in response to a motion for particulars, or during the trial itself, which will bring this matter within the orbit of the *Carbone* case; but for the purposes of this appeal we are bound by the facts which are alleged in the indictment.

We think the instant case is clearly distinguishable from *Carbone,* and that the indictment as written charges an offense under the Kickback Act.

ARGUMENT

Contending that the indictment "clearly shows that the petitioner was engaged in legitimate union activity" (Pet. 4), petitioner asks this Court to reverse the judgment of the court below, which has upheld the indictment on the ground that it does not appear from its face that petitioner was engaged in legitimate union activities when he coerced employees to give him money. This issue of the construction of the indictment as a pleading is not a matter warranting review by this Court at this time. Whether petitioner's actions were or were not legitimate union activities can best be resolved by the presentation of evidence at the trial. The cause is now in the posture it would have been if the district court had upheld the indictment in the first instance. Petitioner would then have had no right of appeal until final judgment. It is ap-

propriate that the determination of the legal effect of petitioner's use of his position as union representative be deferred until the full facts as to the nature of his activities have been developed at the trial.

We submit, moreover, that the court below properly found that there is nothing on the face of the indictment to show that petitioner's activities were legitimate ones on behalf of the union. Certainly, the bare statement that petitioner is a union representative does not warrant a contrary inference. The indictment does not allege, as did the indictment in *United States* v. *Carbone,* 327 U. S. 633, that the payments were demanded as union initiation fees or membership dues. And there are no facts set forth which would make it appear, as in *Carbone,* that the assessments were lawful when made but were thereafter converted. Indeed, the allegation of the instant indictment that petitioner obtained the money "fraudulently" (an allegation which did not appear in *Carbone*), conveys the charge that petitioner, from the first, acted in his own self-interest.

As the court below pointed out, *Carbone* does not hold that a union representative, engaged in conduct other than legitimate union activity, is beyond reach of the statute.[1] This Court's opinion stated (327 U. S. at pp. 639-640): "We need not here at-

[1] The petition, itself, does not appear to challenge this view. It rests on the contention (Pet. 4) that "[t]he indictment in this cause clearly shows that the petitioner was engaged in legitimate union activity."

tempt to delineate the degree, if any, to which the Act applies to activities of trade unions and their officers." The actual holding was merely that the particular acts there charged, which had been construed by the district court to constitute legitimate union activities, were not covered. The broad language of the statute, providing for the punishment of "whoever" uses force or intimidation to obtain kickbacks, would seem to preclude an interpretation which would exempt a union official who uses his power, not for union purposes, but as a means of extorting money from employees for personal aggrandizement. Cf. *United States* v. *Laudani*, 320 U. S. 543, 547, where this Court, in holding that a foreman who had authority to hire and discharge subordinates was covered by the Act, suggested that "foremen not given such broad powers might nevertheless be able to use their authority" to frustrate the objective of the statute. The evil at which the Kickback Act is directed—the use of power to deprive workers of their just wages—is present whether the money goes to a corrupt foreman who has power to hire and fire or to a corrupt union official possessing equal or greater powers over an employee's means of earning a livelihood.

CONCLUSION

The issue presented by petitioner involves merely the construction of the indictment as a pleading and was correctly decided by the court below. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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